UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

APEX LINEN SERVICE, INC.

and **Case: 28–CA–177062**

CULINARY WORKERS UNION LOCAL 226 affiliated with UNITE HERE INTERNATIONAL UNION.

Nathan A. Higley,
for the General Counsel.
Jennifer Braster and John N. Naylor, (Maupin Naylor Braster),
for the Respondent.
Sarah Varela (McCracken, Stemerman &Holsberry),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. On June 3, 2016,[1] Culinary Workers Union Local 226 affiliated with Unite Here International Union (the Union) filed an original charge on behalf of employee Hugo Chuc (Chuc or Charging Party) in Case 28–CA–177062. On August 16, the charge was amended. The General Counsel issued the complaint on August 17 (complaint), and the Respondent Apex Linen Service, Inc. (Respondent or Employer) answered the complaint on August 31, generally denying the critical allegations of the complaint.

This case involves the Respondent's warning, suspension, and ultimate discharge of the Charging Party in late May and early June 2016 soon after the Charging Party joined and assisted the Union and engaged in concerted activities, including attending union demonstrations, his filing two charges with the National Labor Relations Board (the Board) in early April 2016 in Case 28–CA–173178, and in early June 2016 in this case before he was terminated to discourage employees from engaging in these activities. The Respondent denies that these activities had anything to do with Chuc's suspension or discharge and that the suspension and discharge, while

[1] All dates in 2016 unless otherwise indicated.

immediately close in time to the protected concerted activities, were mere coincidence. Respondent argues that because Chuc negligently, recklessly, or intentionally damaged approximately 10 blankets in a test sample while Respondent was soliciting a new hotel linen account, the Charging Party was slated by Respondent's upper management for discharge despite over 4 years of uninterrupted employment at Respondent with no formal discipline directed at the Charging Party.

This case was tried in Las Vegas, Nevada, on October 18, 2016. Closing briefs were submitted by the General Counsel and the Respondent on November 22. On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Nevada corporation with an office and place of business in Las Vegas, Nevada, has been operating a commercial laundry service. The Respondent admits in part, and I find, that in conducting its operations during the 12-month period ending May 26, the Respondent derived gross revenues in excess of $500,000 and purchased and received at its Nevada facility goods and materials valued in excess of $50,000 directly from points located outside the State of Nevada, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exhs. 1(g) 2, 1(i) 2; R. Br. 4.)[3] The parties stipulate and I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act. (Tr. 24; R. Br. 4.) The Union represents workers in hotels and laundries in Las Vegas, Nevada. Id.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Operations

Respondent commenced operations in 2011 and provides a commercial laundry service to a number of Las Vegas casinos and resorts and collects dirty laundry and cleans it at its facility before returning it to its customers. Respondent's facility was comprised of just under 100,000 square feet and had approximately 240 workers in October. (Tr. 45–46, 55.) The Respondent primarily cleans linens including sheets, pillow cases, towels, washcloths, blankets and comforters. The facility also includes a food and beverage wash deck where specialty items are washed. (Tr. 58.) Blankets are one such specialty item. (Tr. 33, 58.)

[2] The transcript in this case is mostly accurate, but I correct the transcript (Tr.) as follows: Tr. 165, line (l.) 2: "he" should be "Chuc;" Tr. 165, l. 17: "He was sawing (sic) there was a wearing out." should be: "I saw the blankets appeared to be wearing out."; Tr. 165, l. 19: "He" should be: "I"; Tr. 165, lls. 24–25: "When he—when he finish dry, he notice there was a strink (sic) coming out of there." should be: "When I finished drying the colored blankets, I noticed there was a string coming out of the blankets."; Tr. 166, l. 6: "He pull it out and give it to the lead person." should be: "I pulled it out and gave it to the lead person."; Tr. 183, l. 4: "he" should be "I."

[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's closing brief, and "R. Br." for the Respondent's closing brief. Although I have included numerous citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

Respondent processes 150,000–200,000 pieces of laundry a day, continuously 7 days a week. (Tr. 30, 34.) Respondent has 13 customers from major Las Vegas resorts/hotels with contracts valued more than a million dollars and each resort/hotel has the exact same types of linen products to clean every single day. (Tr. 46, 60.) Respondent has tunnel washers that are 75 feet long and 12 feet tall and contain the amount of 17 washers and can process 10,000 pounds of linen per hour all day long. (Tr. 56, 112.) In addition, Respondent runs two shifts for cleaning linen, a day shift and a night shift. Id. Respondent also uses pony washers to clean specialty items like blankets and other less common linens.

The choices for various pre-programmed washer settings to clean Respondent's variety of linens include: 1. valet (for white and light garments,) 2. valet (for dark garments), 3. Duvets-colored blankets, 4. white tops and napkins/white spa, 5. color tops, napkins/color spa, 6. Excalibur sheets, 7. white spa sheet/Terry, 8. white pillow slips, 9. white sheets/robes/duvets, 10. white comforters/pillows, 11. color food service shirts/pants, 12. color pool towels, 13. white aprons, 14. white chef coats, 15. color aprons, 16. white bar towels, 17. color utility rags, 18. white stain w/Oxalic, 19. color stain, 20. med. Starch, 21. rinse and spin, and 22. white terry. (Tr. 59; R. Exh. 1E.)

The next step after the wash cycle is to unload the wash and walk it to the dryer and do a very similar preprogrammed dryer setting process where the dryer shows what the heat setting is and the program it is set on for the linen. (Tr. 59.)

Glen "Marty" Martin (Martin) has been Respondent's chief executive officer and one of its founding owners since the laundry facility began in 2011. (Tr. 26, 45.) Since 2011, Martin admits that he has authority to hire and fire all employees at Respondent and he is also responsible for all the operations of every aspect of Respondent. Id.

Martin walks the linen plant floor multiple times throughout the day. (Tr. 55.)

Mario Bran (Bran) is Respondent's plant manager since early 2014, and Bran supervises the Respondent's shift managers and plant supervisors and he sets employees' schedules. (Tr. 85, 102.) Generally, Bran is in charge of scheduling, training, hiring, and disciplining of Respondent's employees and the overall oversight of all work activity at the facility. Id. Bran knows Chuc. Id.

Richard Silverstein (Silverstein) is Respondent's service manager. (Tr. 38, 124.) He reports only to Martin. (Tr. 40.)

Rosario Monzon (Monzon) is a shift manager who reports to Bran and she supervised Diego Quintana (Quintana), the shift supervisor, and Chuc as a washman in May 2016. (Tr. 81.)

Also in May 2016, Quintana was Chuc's immediate supervisor who reported to Monzon and Bran. (Tr. 29.) Quintana did not testify at the hearing in this case.

Chuc was hired by Respondent in December 2011 and Martin considered Chuc a "great" employee who rose up to the position of washman at the time he was terminated in June 2016. (Tr. 65, 159.) Chuc worked the night shift usually from 2:40 p.m. to 1:30 a.m. (Tr. 166–168.) Martin further opines that Chuc was promoted because Chuc had shown leadership and was of high quality and conscientious at his work. (Tr. 65.)

Martin describes Chuc's position as someone who works alone on the wash deck so there's really only one person there that washes laundry and dries it. (Tr. 31–32.)

The Respondent's Reclamation Department functions as a final inspection or check on laundry. (Tr. 34.) Some stains or tears are unacceptable to hotels so the Reclamation Department pulls the unacceptable stained or ripped laundry when being fed in Respondent's equipment. (Tr. 34–35.) This is some laundry's last check to make sure they are stained or torn and, if so, Reclamation bags them and sends them to a recycling company. Id.

Martin describes an earlier problem when a worker dialed in a white stain washer formula which is a heavy bleach formula that one "can smell the bleach" and the Respondent had ruined colored blankets going around in the machine and "it messes you up." (Tr. 49.) Martin further explains that this raised "a very similar issue" to the facts in the current case and Martin is not describing a problem situation where a worker used the improper dryer setting and damaged linen. Id.

Martin further explains that similar to the facts of this case, he knows of a situation where employee Pablo Juarez used the white stain formula when washing blue blankets for the Cosmopolitan Hotel account and this washer setting turned the blue blankets orange. (Tr. 49–50.) Juarez was not terminated but instead he received a written warning by Respondent. Id.

Martin also described the laundry business as being corrupt and very competitive. (Tr. 46.) Martin described an incident where a Respondent supervisor was caught on a hidden camera using an engineers' key to enter Martin's office to photograph Respondent's contracts and steal cash. (Tr. 47.) Respondent terminated the supervisor. Id.

Martin also described another incident in the summer of 2016 where some supervisors were unhappy with a new manager and the related firing of the prior manager and the supervisors asked employees to damage items in order to make the new manager look bad. (Tr. 48–49, 68.) Respondent terminated the supervisors involved in this incident. (Tr. 49, 68.)

The Respondent's standard policy for laundry that Respondent causes the damages is to contact the owner of the laundry. (Tr. 35.) Normal wear and tear is acceptable but if the Respondent makes a mistake and damages a load, the standard policy is to contact the owner and let them know so they can properly run their business knowing they will be have that many fewer items available. Id. Martin makes these calls and says he rarely, or on average, once per month has to do it. (Tr. 35–36.) Later Martin revises his opinion and says that a mistake or malicious-type damage occurs 3–4 times per year above normal wear and tear. (Tr. 73.)

B. Respondent's Growing Animus Against the Union 2015–2016

Martin first became aware that the Union was involved with some of the Respondent's employees in April 2015, by way of an April 28, 2015 letter sent by the Union to Martin and Bran informing Respondent through Martin and Bran that the Union was interested in organizing at Respondent. (Tr. 36–37, 56–57; R. Exh. 2.) The letter further informs Martin that: "[s]tatistical studies of the NLRB representation process show an unfortunate pattern of illegal retaliation against workers who try to organize through that process." (Tr. 67; R. Exh. 2.) The letter also lists the name and classification of 14 Respondent employees who are represented of having formed a committee in support of organizing for union representation.[4] Id. Chuc is not named as one of the 14 employees. Id.

After receiving the April 2015 Union letter, Martin noticed that some 4 or 5 Respondent employees were wearing union buttons at Respondent. (Tr. 36–37, 66; R Exh. 2.)

Also in April 2015, the Union conducted some of its activities at Respondent's facility. (Tr. 54.) On at least 2 occasions, union representatives came to Respondent's parking lot at night and handed out flyers and Martin discovered this due to employee reports. (Tr. 56, 74.) Martin admits that he is also aware that union representatives were visiting employees' homes around this same time. (Tr. 71.) Martin complained that these early union activities distracted employees. (Tr. 71.)

Chuc first became a committee leader for the Union in October 2015 and he wore a union button every day to signify his position as union committee leader. (Tr. 160–161.) Martin and Bran also noticed that Chuc also wore a union button at Respondent. (Tr. 42, 66, 98.)

In addition to these union activities, the Union picketed at Respondent's clients' properties in 2016. (Tr. 36.) On March 17, Chuc took part in a union demonstration and picketing at one of the hotels that Respondent had a current laundry contract – the Tropicana. (Tr. 37–38, 66, 74.) Martin was aware of the union picketing at the Tropicana. Id. Silverstein was there at the Tropicana union picketing and he took photographs of the demonstration and he shared them with Martin. (Tr. 51, 140.) Bran also was aware that the union was protesting on some client properties. (Tr. 99.)

Martin opined that a safety issue had arisen at the hotel and so Respondent's Research Service Manager Silverstein went to the hotel to see if there were any safety issues or problems with Respondent's employees dropping off and/or or retrieving the usual laundry from its customer the Tropicana. (Tr. 38)

On March 31, Chuc took part again in a union march in support of unionization and picketing at the Treasure Island Hotel in Las Vegas with other union committee members who were employees at Respondent as well as three of his sons. (Tr. 162, 171–172.) Respondent also had a laundry contract with the Treasure Island Hotel on March 31. (Tr. 37–38, 40, 44, 51–52, 66, 74, 134, 161–163; GC Exhs. 6(a)–(g).) By April 1, Martin was also aware that Chuc took

[4] Of the employees listed as union organizing committee members, at least four of them, or more than 25%, had been terminated by Respondent by the time of hearing. Tr. 75–77.

part in this union march and picketing.[5] Id. Bran also was aware that the union was protesting on some client properties. (Tr. 99.) Martin admitted that Chuc's presence at the March 31 Treasure Island demonstration was additional evidence that Chuc supported the Union. (Tr. 66.)

Martin opined that a safety issue had arisen at the hotel on March 31 and so Silverstein went to the hotel to see if there were any safety issues or problems with Respondent's employees dropping off and/or or retrieving the usual laundry from its customer the Treasure Island but Silverstein had no concerns about the union demonstration but decided to hang on to observe and take photographs. (Tr. 38–40, 44, 52–53, 68–69, 99, 125–131, 146; GC Exhs. 6(a)–(g).) Silverstein took photos from the Treasure Island with his camera phone and shared them with Martin and Bran which showed Chuc participating in union picketing at the hotel with placards saying that it is unfair that Respondent does not have a contract with the Union.

Silverstein's photos and videos from the Treasure Island Hotel only show union picketing at a location out of the way and not a safety issue. The photos and videos show Respondent's employees who participated in the demonstration and carried placards with Respondent's name on them. (GC Exh. 6(a)–(g); GC Exh. 7.) I find that the photos also show that Chuc is not in any position that blocked the loading dock or created any safety concern but he marched and picketed on a sidewalk nearby that did not block Respondent's laundry trucks.[6] Id.

Martin admits that before the end of May, he knew that Chuc was involved with the Union not only because he saw Chuc picket at the Treasure Island for the Union against the Respondent on March 31 but also because Martin had seen Chuc wear a union button almost daily. (Tr. 42, 66–67.)

C. The Original Charge and Complaint

On April 4, Chuc filed an original charge against the Respondent in what later became NLRB Case 28–CA–173178 (Case No. 28-CA-173178) and also later settled. (Tr. 10.) The charge alleged that Respondent interfered with Chuc's rights under Section 7 of the Act, alleged that Respondent engaged in surveillance of employees' union activities including photographing and recording video of employees' marches in support of unionization, alleged that Respondent told employees to take off union buttons, and that Respondent told employees that it would be futile for employees to support the union. (GC Exh. 2(e).) Martin also knew before he terminated Chuc that Chuc had filed a charge against the Respondent with the NLRB that later settled as Martin received a draft settlement agreement from the Board in Case No. 28-CA-173178 sometime in late May or early June before Chuc was terminated that contained Chuc's name in the signatory block as the settling party before Martin and Chuc signed it after Chuc was terminated. (Tr. 67; GC Exh. 2.)

[5] The Respondent was not allowed to subpoena the Union's picketing activities on March 17 and March 31 as I find that these activities are not relevant to this case except I accepted a stipulation from the parties that these activities took place on March 17 and March 31 and Chuc participated in the picketing for the Union and Respondent was aware of Chuc's Union activities on these dates. Tr. 37–38; October 14, 2016 Order Addressing Pending Petitions to Revoke Subpoenas.

[6] Silverstein also made 2 videos from the Treasure Island union picketing that I find were recorded accidentally and provide nothing more than the photos themselves. Together I find that they evidence Respondent's surveillance of Chuc's union activities. Tr. 129, 131–133, 138.

D. The Hilton RFP in Last Part of May 2016

By May 22, according to Martin, Respondent was in the fifth or sixth day in the request for pricing (RFP) process with Hilton Grand Vacations (Hilton) to the point that pricing in the contract between Respondent and Hilton had been approved as acceptable and Hilton was in the final selection process with the Respondent for a laundry contract that Martin estimates to be worth $2.5 million /year to Respondent. (Tr. 32–33, 62.)

Martin further explained that the normal practice is for the tested laundry facility to wash and dry five to 10 hampers full of a few days' worth of sample laundry loads mostly of sheets, washcloths, hand and bath towels, and an occasional blanket or comforter to be washed over a week's period. Id. The hotel usually provides these sample loads to test the Respondent's laundry quality and to make sure nothing is strange, there is no low quality, and that the laundry service's standards are acceptable to Hilton. Id. Martin opined that what makes the blankets so special is that you usually only get four or five of them in a hamper so if there is damage to a sheet or some non-special item, it could go unnoticed, but with blankets it really sticks out and can't go unnoticed. Id.

This entire RFP process between Respondent and Hilton was known to everyone working at Respondent at this time. (Tr. 33, 61–62.) Respondent selected its best people, including Chuc, to handle the RFP process and the sample load of laundry. Id. Martin claims that Respondent's best people were selected because it was so important to Respondent and he further claims he explained to all employees what the situation was. Id.

E. The May 22 Chuc Incident

Martin admits that on May 22, Respondent "wanted to stain wash them too [the 2 loads of colored blankets that get burned] as a special process for these, so Diego [Supervisor Quintana] specifically met with him [Chuc] and said, this is what we want to do for this account so that they look great, because it's a brand new account." (Tr. 62.) Chuc also admits that he knew the 10 colored blankets belonged to Hilton as a possible new account for Respondent. (Tr. 180–181.) Chuc adds that receiving specific orders from Supervisor Quintana was highly unusual and had never happened before Quintana ordered Chuc to use specific double stain wash cycle settings on May 22.

On May 22, Chuc confirmed that he received special instructions from Supervisor Quintana to use a two-stain wash cycle to wash the 10 Hilton blankets in the Setting No. 19 "colored stain" wash setting twice which, as mentioned above, is a stronger wash setting using bleach than the usual "colored blanket" wash setting No. 3 that Chuc normally would have used and a setting that Respondent had not yet used with Hilton's blankets prior to May 22. (Tr. 62, 106, 114, 119–120, 164.) These 10 blankets were damaged from the double colored stain wash setting and not by any specific dryer setting which chemically burned the 10 colored blankets and damaged them. (Tr. 114, 164.) This 10 damaged blankets incident is known hereafter as the May 22 Chuc incident.

After washing the 10 colored blankets as instructed by Supervisor Quintana, Chuc noticed that the blankets were wearing out. (Tr. 165.) Noticing this, Chuc used a dryer program that used less heat than Chuc would normally use to dry colored blankets. Id. After the dryer

cycle finished, Chuc noted further damage to the colored blankets seeing a string of loose fabric which indicated to Chuc that the 10 colored blankets were a little bit more damaged in the dryer cycle than he had noted earlier with them coming out of a double "color stain" wash cycle. (Tr. 165–166.)

Chuc admits that he damaged laundry as part of the May 22 Chuc incident. (Tr. 163–164.) Chuc further opines, however, that the 10 colored blankets were damaged because they were washed twice on the colored stain wash cycle that Supervisor Quintana ordered Chuc to use. Id. Chuc even warned Supervisor Quintana beforehand "that the materials [10 colored blankets] can be damaged through the wash" by using a two-stain wash instruction. (Tr. 164.) Chuc opined that the color stain wash formula "is more stronger [sic] than we had in the company [at Respondent]."[7] (Tr. 164.) Notably, Supervisor Quintana responded to Chuc's warning saying to him that this is an order and you have to follow it "because it's coming from upstairs." (Tr. 165, 183.)

Chuc received no special instructions as to how to *dry* the two loads of 10 colored blankets. (Tr. 164.) Chuc knows how to operate Respondent's washers and dryers and on May 22 they were not malfunctioning because the machines provide some warning messages information when they are not working properly. Id. Chuc points out once again that Supervisor Quintana's special orders to Chuc on May 22 was the only time that Supervisor Quintana gave Chuc orders as to what wash cycles to use when washing linens. (Tr. 183.) As stated above, Chuc also recalled that on May 22, the specific wash cycle order that Supervisor Quintana gave to Chuc came from "upstairs" or Respondent's upper management. (Tr. 183.)

After Chuc took the 10 damaged colored blankets out of the dryer, he took the blankets to Shift Manager Monzon who immediately responded to Chuc pointing out to him that the blankets had been burned. (Tr. 166.) Chuc responded to Monzon saying: "yes, I know." Id.

Next, Supervisor Quintana speaks up to Chuc and tells Chuc that Chuc is the one that burned the 10 blankets. (Tr. 166.) Chuc responded to Supervisor Quintana pointing out to him that the 10 blankets got burned because Supervisor Quintana ordered Chuc to wash the 10 colored blankets on the *new* double stain wash settings that had never been used on Hilton colored blankets before. (Tr. 62, 106, 114, 119–120, 164, 166.)

Bran admits that he knows what occurred on May 22 only by what he was told by Supervisor Quintana. (Tr. 116.) Bran knew of the damage to the blankets on the night it occurred. (Tr. 91–92.) Bran admits that this May 22 Chuc incident is the first and only time that Chuc had damaged customer goods. (Tr. 111.)

Monzon saw the damaged blankets on May 22 when Chuc brought them to Supervisor Quintana. (Tr. 82–83.) Monzon saw that the burned blankets were at the top of the load that Chuc delivered to Quintana which also explains why Monzon knew they were damaged. Id. Monzon, however, further explains that she did not report the damaged blankets to Bran or

[7] Chuc's primary language is Spanish and he used Bran as an interpreter at hearing. I understand Chuc's "more stronger" statement to mean that Respondent's colored stain wash formula (No. 19) was one of the strongest formulas for getting out stains second only to the white stain wash formula containing Oxalic (No. 18). The instruction to Chuc to use the stronger colored stain wash formula "twice" by Supervisor Quintana subjected the 10 colored blankets to a strong stain wash two times as part of the May 22 Chuc incident.

anyone else above her at Respondent because Chuc was working under Quintana's supervision at the time the blankets were damaged. (Tr. 83, 166.)

Chuc did not hide the damaged blankets from Respondent's management—they were on top of the load he delivered to Supervisor Quintana and both shift Manager Monzon and Supervisor Quintana had an open view and were fully aware of the damaged blankets from Chuc on May 22. (Tr. 82–83, 120–121.) The damaged blankets occurred late in the night on Chuc's night shift and Supervisor Quintana delivered the damaged blankets directly to Bran's office. In addition, soon after delivering the damaged blankets to Bran's office, Supervisor Quintana brought the damaged blankets to Bran's attention by text or email at the end of the night shift at 1:30 a.m. on May 23. (Tr. 69–70, 85–86, 96, 100.) Supervisor Quintana reported to Bran that Chuc delivered to Quintana the damaged blankets at the end of his shift and that the washer at that time and not the dryer had caused damage to the blankets.[8] (Tr. 87, 91–92, 100.)

F Martin and Bran Falsely Accuse Chuc of Hiding the May 22 Chuc Incident the Morning of May 23

Martin also became aware of the May 22 Chuc incident in the morning after the incident occurred on May 23 at 8 a.m. when he met with Bran in Bran's office where the damaged blankets were located. (Tr. 28–29, 63, 69–70.) Martin described the May 22 Chuc incident to include the damaged blankets being tucked away and a surprise that Martin and others found that morning at 8 a.m. (Tr. 29.) Martin discussed the damaged blankets and Martin professes that Bran told him that Bran did not know how the damaged Hilton colored blankets occurred. (Tr. 63.)

In response to this, Martin next instructs Bran that "we need to figure it out [how the blankets got damaged]." Tr. 63.) Martin next asks Bran who was the operator and Bran tells him it was Chuc. Id. Martin next views the two damaged loads of 10 colored blankets and it is at this time that Martin explains "we [Martin and Bran] decided to suspend him [Chuc]." Id. Next, Martin changes this explanation to: "I [Martin] decided to suspend him [Chuc]."[9] Id.

[8] I reject Bran's testimony that he immediately opined that the 10 colored blankets were "burned on the dry cycling" because the written warning discipline issued by Bran at approximately 2:50 p.m. on May 23 only references "damaged" laundry and not burned laundry. GC Exh. 3. Also, I further find that Chuc was a more believable witness and Martin's testimony confirming that Respondent intended to use the stronger stain wash cycle on Hilton's colored blankets for the first time on May 22 is consistent with Chuc's testimony that the double bleached wash cycle damaged the colored blankets rather than a hot dryer cycle.

[9] Bran contradicts Martin and testified under oath at hearing that he (Bran) made the decision to suspend Chuc based on the newly discovered information he got together for the blankets during the day on May 23. Tr. 91. Bran says despite having the damaged blankets in front of him early on May 23 as delivered by Quintana to his office late on May 22, Bran somehow learned more about the quantity of damaged blankets from the time of the written warning at 2:50 p.m. until later in the day when Chuc was suspended. Bran claims he went through the damage to the 10 blankets and found out how many pieces were damaged and discovering this increased damage later in the day led to Chuc's suspension. Tr. 91–92; GC Exh. 4. Again I reject Bran's statements here as Martin was the more reliable witness on the subject of who suspended Chuc even though both the suspension form and the written warning were signed by Bran and both are signed by Chuc. GC Exhs. 3 & 4. More importantly, I reject Bran's explanation as to why Chuc was suspended later on May 23 as being untrue as the same damaged blankets were delivered to Bran and directly in front of him when he issued the written warning to Chuc at approximately 2:50 p.m. on May 23 so I reject his testimony that later on May 23 Bran somehow discovered exactly the 10 damaged

Martin viewed the damaged blankets very briefly and was also notified by Chuc's supervisors that Chuc had received very specific instructions from his supervisor to follow—specific wash cycle and specific dryer cycle to clean Hilton's colored blankets, and the supervisors had to figure out how the colored blankets were damaged the night before. (Tr. 57.)

G. Chuc Receives a Written Warning for the May 22 Chuc Incident

Before returning to the work floor to begin his shift on May 23, Chuc went to the HR department at Respondent and met with Juanna Juanita (Juanita), the secretary of the office. (Tr. 167.) Chuc asked Juanita if he could make a report about the May 22 Chuc incident, Juanita recorded it, and told Chuc that she would give the report to Martin. Id.

Chuc returned to work on May 23 at 2:40 p.m. when his shift begins and Bran pulls Chuc into his office 10 minutes into his shift and talks to Chuc about the May 22 Chuc incident. (Tr. 87–88, 168.) Monzon is also present. (Tr. 94.) Bran believes that because of the damaged blankets, he needed to meet with Chuc, counsel him, and "put something in writing." (Tr. 92.)

Bran next issues Chuc a written warning based entirely on the information provided him the night before by Supervisor Quintana for causing a potential claim or loss of the account due to the damage to Hilton Grand Vacations' blankets.[10] (Tr. 30, 85–86, 88–89, 91; 1(g) 3; 1(i) 3; GC Exh. 3.) Bran explains that he gave Chuc a written warning because "we need to follow the procedure on the disciplinary actions and when they [employees] damage something I [Bran] have to make sure we put that on record." (Tr. 89.) The written warning says: "Yesterday, a lot of the items from one of our accounts were damage[d][sic], this could cause a potential claim or loss of the account." (GC Exh. 3.) Bran advises that "as a washer [Chuc] has [to] be more careful and avoid these problem[s]." Id. Bran also warns Chuc under the "Consequences Should Incident Occur Again" section of the written warning that if Chuc causes more linen damage in the future "it may result in further disciplinary action…." Id. Bran did not interview Chuc about the incident at any time or follow-up with Chuc after talking with Supervisor Quintana about the incident. (Tr. 101.)

Chuc responds to the written warning by writing that he is not in agreement with this warning because Chuc said the error that caused the damage to 10 blankets came from Supervisor Quintana who ordered Chuc to wash the 10 blankets twice on a stain wash cycle that caused the damage to the blankets. (Tr. 93, 168; GC Exh. 3.) Stated differently, Bran understood Chuc's comment to mean that Chuc did not think he deserved the warning because the orders how to wash the 10 blankets that were damaged in the wash were made by Supervisor Quintana and not Chuc. (Tr. 93, 168; GC Exh. 3.)

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blankets when the same were directly in front of him at the top of the load dropped off by Quintana. Tr. 95. Later Bran changes his testimony again to say that he decided to suspend Chuc so he could get answers to the questions of whether Chuc damaged the 10 blankets on purpose or if there was something wrong with Respondent's equipment. Tr. 92. I further reject this explanation for Chuc's suspension as being inconsistent to what is mentioned in the written suspension and Martin's testimony that he suspended Chuc on May 23.

[10] Somehow, Martin denies that Chuc received a written warning from Bran for the May 22 Chuc incident and Martin insists that Chuc was only suspended and terminated for the same May 22 Chuc incident. Tr. 74–75. I reject this testimony as in direct conflict with Chuc's and Bran's testimony and GC Exh. 3 - Respondent's written warning to Chuc for the May 22 Chuc incident signed by Chuc and Bran on May 22, 2016 after they met in Bran's office at 2:50 p.m.

Chuc asked Bran if he could continue working his shift after receiving the written warning and Bran responded that yes, Chuc could continue working his shift. (Tr. 168.) Bran did not suspend Chuc at this time. (Tr. 89.) Chuc returned to the work floor and worked after receiving the written warning from Bran. (Tr. 89.)

H. Chuc Receives a Written Suspension for the Same May 22 Chuc Incident

Approximately 10 hours later on May 23 at the end of Chuc's shift, Respondent also suspended Chuc. (Tr. 63, 89–91; GC Exh. 4.) The form makes the same reference as the written warning to Chuc having caused damage to a load of an account and damaged items. The written suspension also adds that it is based on more information and damaged items and that Chuc was now being suspended. (GC Exh. 4.) Chuc recalls being told by Bran that the suspension came about because "they [Bran and other managers] found more evidence." (Tr. 169.) The suspension also says that Chuc had a prior discipline which Bran explains is the written warning from earlier that same day for the same May 22 Chuc incident. (Tr. 94; GC Exh. 4.)

Bran admits that he suspended Chuc for the same May 22 Chuc incident that Bran already issued a written warning about to Chuc. (Tr. 90; GC Exh. 3 and GC Exh. 4.) Bran says the written warning was issued at the beginning of Chuc's shift on May 23 and the suspension was issued at the end of Chuc's shift approximately 10 hours later. (Tr. 90–91.) Bran further admits that there was no additional information obtained or damaged blankets discovered by Bran after Chuc was suspended. (Tr. 94–95.) Bran further explains that Shift Manager Monzon was in Bran's office when Bran handed Chuc the suspension. (Tr. 94.) At the time of Chuc's suspension on May 23, Bran was fully aware of the 10 damaged colored blankets related to the May 22 Chuc incident.[11] (Tr. 95.)

At no time after Chuc was suspended on May 23 did Bran interview Chuc or have any other conversation with him about the May 22 Chuc incident. (Tr. 101, 116.) Bran says he did call Supervisor Quintana and asked him about Chuc's statements about Quintana ordering Chuc to use the stain wash cycle on the two loads of 10 colored blankets. (Tr. 101.) Bran did not follow up with Chuc to get more of his side of the story. Id.

Martin opines that Respondent's standard protocol is to suspend an employee first and then do a full investigation. (Tr. 57, 88.) Martin further opines that sometimes it takes 2 weeks to get the full story from an investigation with managers working two shifts, days off are strange, so as to "speak to everybody [about an incident], get a hold of everyone, and do the proper paperwork [about the outcome of an incident investigation." (Tr. 30–31.) Martin further adds that no investigation is typical but Respondent tries to get everyone's facts and Respondent also tries to make sure everyone reciting the facts is being truthful. (Tr. 31.)

Martin further explained that Chuc was suspended for burning blankets and "not telling anyone about it. . . . ." (Tr. 60.) Martin further opines that the dryer was set too high of temperature and it burnt all of the items (2 loads of colored blankets) in both loads. Id. Also,

[11] I reject Bran's statement as untrue that at the time Bran issued the written warning to Chuc, Bran "didn't know exactly how many [damaged] pieces there were." Tr. 95. Supervisors Monzon and Quintana saw the 10 damaged blankets that Chuc delivered to them the night of the May 22 Chuc incident and Bran admits that these 10 blankets were delivered to his office the next day and that he looked at them with Quintana. Tr. 87–88.

Martin opines that Chuc knew these 2 loads of colored blankets were for tests to try and get the new Hilton account. (Tr. 61.)

On May 26, the Union filed a charge to Martin's attention which became this case with the Board against Respondent (the May 2016 case). On June 3, the Union filed a first amended charge also to Martin's attention on behalf of Chuc in this May 2016 case. (GC Exhs. 1(a) and 1(d).)

I. The Investigation of the May 22 Chuc Incident

Bran believes that Supervisor Quintana ordered Chuc to wash the 10 colored blankets using the stronger white or colored stain wash cycle Nos. 18 or 19, dry them, and return them to Supervisor Quintana which was done by Chuc. (Tr. 103, 114–115.) Chuc convincingly recalled that May 22 was the only day that Supervisor Quintana gave him specific orders to wash the 10 blankets using a double stain wash cycle. (Tr. 182–183.) In addition, Bran confirms that the 10 colored blankets at issue here were washed by Chuc on the stronger stain wash cycle than the usual colored blanket wash cycle No. 3 and that Wash cycle No. 19 has a longer cycle, runs at a higher temperature, and uses "more chemistry" on linen being washed.[12] (Tr. 104, 121, 184.) Bran opines that for the blankets, "one stain wash was more than enough." (Tr. 119.) Bran further explains that the instructions to use the stain wash usually meant just one stain wash and not 2 stain wash cycles. (Tr. 118.)

While Bran also mentioned that Respondent had no prior problems with its stain wash burning any sample linens from Hilton Grand Vacations earlier in the week, there was no definite confirmation that the stain wash that was used on any colored blankets from Hilton were washed on anything but the No. 19 colored blankets wash cycle as contrasted with colored blankets washed on the No. 18 stain wash cycle with bleach. (Tr. 105–106.) In fact, Bran later confirms that no other types of linens owned by Hilton were washed in the stain wash cycle prior to May 22. Thus, May 22 was the first day of the test period that Respondent was asked to wash anything including colored blankets on double stain wash.[13] (Tr. 105–106.) Moreover, Bran further admits that on May 22, the Respondent tried to use a stronger wash formula to remove stains on Hilton's linens so the color stain setting No. 19 for the first time was used over the usual colored blankets setting No. 3.[14] (Tr. 114.) More importantly, May 22 is the only day that Chuc received specific wash orders from Supervisor Quintana as to the 10 Hilton blankets. (Tr. 182–183.) Chuc also opined that the lighter wash cycle for colored blankets, setting No. 3, would have been the proper wash cycle to use instead of the double stain wash ordered by Supervisor Quintana for Hilton's colored blankets that were damaged as part of the May 22 Chuc incident. (Tr. 184.)

[12] I reject Martin's opinion that the stain wash process does not get to a high enough temperature to damage blankets and that "it's just not physically possible." Tr. 64–65. This opinion is in conflict with Bran's opinion that Washer cycle No. 19 runs hotter and uses more chemicals. Consequently, common logic dictates that a double stain wash cycle No. 19 would run even hotter and use double the chemicals.

[13] This testimony is in conflict with Bran's later response to a leading question by Respondent's counsel on cross-examination which I reject: that Respondent was using the same stain wash all week before May 22 on Hilton's blankets. Tr. 106.

[14] Bran denies that Quintana ordered Chuc to use the white stain with Oxalic setting No. 18 on Hilton's 10 colored blankets. Tr. 114.

The Respondent was unable to determine what dryer setting Chuc used on May 22 in connection with the 10 damaged blankets.[15] (Tr. 115.)

The two loads of damaged colored blankets occurred toward the end of a weeklong test process between Respondent and Hilton. (Tr. 60–61.) Respondent did not get the laundry contract with Hilton Grand Vacations. (Tr. 62.) Hilton supposedly mentioned to Martin that "they weren't happy with the wash test." (Tr. 33.)

Martin opined that Chuc's conduct for the May 22 Chuc incident was investigated just the same as Respondent would investigate anything involving employee misconduct or damaged laundry as a committee was formed first to investigate the incident before any decision to terminate Chuc was made. (Tr. 27.) According to Martin, the committee was comprised of Bran, Monzon, and Martin before Martin made the ultimate decision to terminate Chuc. (Tr. 27.) Later in his testimony, Martin changes the composition of the committee to add Quintana to the committee who met to investigate the May 22 incident. (Tr. 31.)

Martin further described the investigation as involving management who were directly on the plant floor as shift supervisors (Monzon and Quintana) who saw the actual product and the 10 blanket damage and everything. (Tr. 31–32.)

Martin oversaw the investigation of the May 23 Chuc incident after Chuc was suspended. (Tr. 63.) Martin did not go directly to speak to other employees on the floor or anything like that. Id. Martin later confirms that Bran, Monzon and Quintana conducted the investigation of the May 23 Chuc incident. Id. Martin did not speak to Chuc as part of the investigation before Chuc was terminated. (Tr. 64.) Martin admits that he ultimately made the decision to terminate Chuc on June 10. (Tr. 63; GC Exh. 5.) Martin terminated Chuc because he "couldn't find a way that this [May 23 Chuc incident] was accidental" and after it happened, Martin says he fired Chuc also because he did not come forward and tell anyone of the damaged blankets. (Tr. 64.) Martin further opines that everyone makes mistakes and owns up to it but Chuc covered it up. Id.

Bran double-checked with Respondent's engineer crew to confirm that nothing was mechanically wrong with Respondent's dryers to damage the blankets on May 22 as Chuc did. (Tr. 86.) Bran tried to duplicate the damaged blankets on some sample blankets to determine if the damaged blankets were a mistake but he could not replicate the damage using the dryer alone. (Tr. 86–87.) Bran admits that only the dryer was tested to replicate the damaged blankets and that at no time did Bran try to replicate the blankets' damage using a standard stain wash cycle with colored blankets. (Tr. 96.)

The Respondent committee concluded that Chuc maliciously damaged about 10 blankets in an effort to stop Respondent from getting a new property laundry contract with Hilton Grand Vacations on Las Vegas Boulevard in Las Vegas, Nevada. (Tr. 28, 32.) Martin further opined

[15] Because Respondent was unable to replicate the same damage to the 10 Hilton blankets using various dryer settings after-the-fact, I further find Respondent's investigation incomplete as it is more probable than not that Respondent would have had better success replicating the 10 Hilton blanket damage if it used washer setting No. 18 for white stain with Oxalic or two times washed under the washer setting No. 19 for colored stain as alleged by Chuc and ordered by Supervisor Quintana. The fact that Respondent did not even attempt to replicate the damage using the double stain wash cycle No. 19 or various washer settings as Chuc said it occurred is evidence that Respondent's investigation was improperly conducted.

that the 10 blanket damage from the May 22 Chuc incident was part of a sample dry run for Respondent to try and secure a multi-million dollar new account with Hilton Hotels and that the incident is a "pretty gross offense" as Respondent was in the final stages of the bid process with Hilton. Id. Martin next alleges that Chuc had other behavioral issues in his 4 years at Respondent but that they did not come into play regarding the damaged blankets and Chuc's termination.[16] Id.

Martin changes his description of the Chuc incident regarding the Hilton blanket damage from the similar wrong washer setting where the wrong colored stain formulas with bleach that turned blue blankets orange similar to the damage Juarez caused that resulted in Respondent issuing him a written warning to a new description by Martin of the incident involving Chuc. (Tr. 49–59, 57–58.) Martin now describes the Hilton blanket damage as resulting from Chuc using the wrong dryer setting as two loads of overheated blankets that practically melted from the heat, almost welded to each other, so that if one were to pull it apart, you would have holes in it and they are destroyed. (Tr. 57–58.)[17]

Martin later confirms that Supervisor Quintana told Chuc to specifically wash the colored blankets on the "stain wash" cycle rather than on the "colored blanket" cycle which would normally be the standard process washing cycle for colored blankets "if it weren't a new special account." (Tr. 65.) I reject this statement as inconsistent with Chuc's more credible explanation that Supervisor Quintana ordered Chuc to use a double stain wash formula cycle No. 19 over the standard process washing cycle No. 3 for colored blankets.

Martin had knowledge that Respondent was settling a charge filed by Chuc against the Respondent in late May/early June in Case 28–CA–173178 and that Chuc would be a signatory with Martin on the settlement agreement. (Tr. 40–41; GC Exh. 2.)

Martin said that he and Respondent get charges filed by the Union all the time these days and that: "It's very frustrating." (Tr. 41.) Martin testified that he did not care that Chuc had filed a charge or that employees support the union but later Martin admitted that the Board charges are a financial drain on Respondent, including requiring managers to attend hearings. (Tr. 67, 70–71.)

J. New Charge in Case No. 28-CA-177062, the Chuc Discrimination Claims

On June 3, the Union filed an amended charge on behalf of Chuc against Respondent in this Case No. 28-CA-177062 which alleges that Respondent discriminated against employees Chuc, and Eloy Gomez, and Ana de la Torre by disciplining, suspending, or discharging them because of their union activities and in order to discourage such. (GC Exh. 1(c).)

[16] No evidence was produced in support of this wild claim by Martin. I reject this allegation as being another false statement by Martin that Chuc had any behavioral issues at Respondent.

[17] Bran also responds "yes" to a leading question on re-cross examination from Respondent's lawyer as to whether "looking at the blankets, could you visibly see that there was [sic] burns on it?" Tr. 119. I reject this testimony as being the result of a leading question. See e.g. *H.C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977) (answers to leading questions not entitled to credence).

K. Chuc Is Discharged by Respondent for the Same May 22 Chuc Incident

On June 8, the decision to terminate Chuc for the May 22 Chuc incident had been made by Martin after the investigation. (Tr. 96–97; GC Exh. 5.) Bran tried to contact Chuc to communicate the termination later that day at 4 p.m. and 4:15 p.m. and left messages for Chuc to come into Respondent to meet.

On June 10, Respondent discharged Chuc "[b]ased on investigation took place 5/23/16 it determ [sic] were negligent proper [sic] drying causing damage on property and company items." (GC Exh. 5.) Martin admits that he played a significant part in terminating Chuc and opines that his role in Chuc's termination was that of ultimate decision-maker after a Respondent committee investigated the May 22 Chuc incident.[18] (Tr. 27–28.) Martin admits that everything he learned about the May 22 Chuc incident investigation came to Martin from Manager Bran, Supervisor Monzon and Supervisor Quintana. (Tr. 72.) Martin opines that Respondent properly investigated the May 22 Chuc incident. (Tr. 70–71.)

Monzon denies having anything to do in the decision to discharge Chuc. (Tr. 83.) Bran recalls that when Chuc was informed he was being terminated, Chuc responded only, "That's fine." (Tr. 111.) This is the only conversation that Bran had with Chuc regarding the damaged linen. (Tr. 116.)

Bran opines that Chuc destroyed the 10 blankets either on purpose or from Chuc's negligence as to the way Chuc dried the 10 blankets and that is what caused the damaged blankets. (Tr. 116–117.) Bran further says that he believes that Chuc knew he would damage the 10 blankets when he used the dryer setting he entered and that Chuc did it knowing it would destroy all 10 blankets. (Tr. 117.) Finally, Bran further opines that Chuc choosing to destroy the 10 blankets by using an improper dryer formula is unexplainable to Bran.[19] (Tr. 118.)

Analysis

I. Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

[18] Plant Manager Bran disagrees with Martin and Bran says: "Actually, I'm the one that makes the decisions when I terminate employees" and that Bran, not Martin, made the decision to terminate Chuc a couple weeks after Bran suspended Chuc solely due to the damage cost to the laundry (Hilton's damaged 10 blankets). Tr. 86–87, 97. I reject Bran's testimony here in direct conflict with Martin's as I observed Martin to be the more credible and confident witness on the subject of who suspended and terminated Chuc.

[19] I reject Bran's opinions that a dryer damaged the 10 colored blankets as I find Chuc's explanation for the damaged blankets more believable that Supervisor Quintana ordered Chuc for the first time on May 22 to use a double stain wash formula No. 19 and this very strong wash cycle damaged the 10 colored blankets.

The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Moreover, an adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge. See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify); *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact). In this case I make an adverse inference.

It is impossible to reconcile all of the different recollections of the witnesses for both sides. In evaluating the various different versions of events, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have considered the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; consistencies or inconsistencies within the testimony of each witness and between witnesses with similar apparent interests. See, e.g. *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). Testimony in contradiction to my factual findings has been carefully considered but discredited. Where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis below.

Chuc testified consistently throughout his testimony which raises no doubts in my mind as to the events he described that occurred particularly on May 22 and May 23, 2016. Specifically, I acknowledge that Chuc's testimony at hearing differed from his testimony through an earlier affidavit and I attribute the variation to a truthful more reasoned answer with no assumptions as contained in the affidavit. I give more weight to Chuc's honest testimony at hearing than his more speculative guess that dyed towels in a wash cycle remained dyed after his shift was over and the wash cycle continued. The dye transfer apparently took place in the tunnel when Chuc's shift was ending and he originally thought that the dye transfer had been permanent when at hearing he thought there a possibility that the dye transfer got resolved since his shift ended before the towels at issue were done washing. (Tr. 170.) Also, I attribute Chuc's thinking that Bran and not Martin was responsible for warning, suspending, and terminating him to the fact that Chuc faced Bran with this discipline at Respondent. Martin convincingly admitted that as chief operating officer of Respondent, he made the overall discipline decisions, other than issue the written warning, and Bran carried them out on Martin's orders.

I also find the Union's director of legal affairs, Norbert Kubiak (Kubiak) to be a believable witness who appeared very professional and testified consistently without hesitation and took his testimony seriously. Respondent elected not to cross-examine Kubiak. Supervisor Monzon also testified in a straight-forward manner without pause throughout most of her limited testimony.

Respondent's former supervisor and agent, Supervisor Diego Quintana, did not testify at hearing to confirm whether he ordered Chuc to use a double stain wash formula on the 10 damaged Hilton blankets on May 22, 2016. I draw an adverse inference from this as "when a

party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. In particular, it may be inferred that the witness, if called, would have testified adversely to the party on that issue." *International Automated Machines,* above. Thus, I infer that if Supervisor Quintana had been called, he would have further admitted that he relayed orders from Respondent's upper management for Chuc to use a double wash formula on Hilton's 10 colored blankets which caused the May 22 Chuc incident damage and not Chuc's mistake, negligence or malicious intention to damage Hilton's blankets. Respondent did not provide any explanation as to why Quintana did not testify or show that Quintana was unavailable or that it tried to subpoena him to hearing. See *Martin Luther King, Sr., Nursing Center*, above ; *Flexsteel Industries*, above (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

Other than Martin completely being unaware of Chuc's written warning discipline for the same May 22 Chuc incident —which is surprising—I found in observing Martin, as a part-owner of Respondent and its highest ranking official, that he was much more relaxed, confident and credible with his testimony than Bran was as to who actually made the decisions to suspend and discharge Chuc (even though Bran, unbelievably, said these last two decisions were his to make). Bran's untrue statements that he had final authority over Martin to suspend and terminate Chuc are rejected as not credible. Martin testified inconsistently as to the incomplete investigation of Chuc, his untrue statement that Chuc concealed the damaged blankets and did not tell anyone about it, and his false statement that Chuc had behavioral issues. Martin also appeared flustered at times in his testimony. Martin acted new and inexperienced to union campaigns and slightly overwhelmed dealing with union activities on a frequent basis and he complained it was frustrating and was causing a high financial drain on Respondent.

II. Respondent's Unlawful Discipline of the Charging Party Chuc

A. Chuc's Protected Union Activities and Respondent's Knowledge of Them

Complaint paragraphs 6 and 8-10 allege that the Respondent has been discriminating in regard to the tenure and terms or conditions of employment of Chuc, discouraging membership in a labor organization or discriminating against Chuc for filing charges under the Act in violation of Section 8(a)(3) and (1) and Section 8(a)(4) and (1) of the Act, respectively, when he received a written warning, a suspension, and a discharge, for the same offense.

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. In addition, under Section 8(a)(4) of the Act, an employer cannot discriminate with regard to tenure or any term or condition of employment for an employee's filing charges under the Act. For both 8(a)(3) and 8(a)(4) violations, the Board applies the analysis set forth in *Wright Line* to determine whether the adverse employment action was effected for prohibited reasons. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Under *Wright Line*, to establish unlawful discrimination on the basis of union activity, the General Counsel must make an initial showing that antiunion animus was a substantial or motivating factor for the employer's action by demonstrating that: (1) the employee engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer harbored antiunion animus. *Amglo Kemlite Laboratories*, 360 NLRB 319, slip op. at 7 (2014). Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. If the General Counsel satisfies this standard, the burden then shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Dentech Corp*., 294 NLRB 924, 956 (1989).

With respect to the General Counsel's initial showing, it is undisputed that Chuc engaged in protected activities by wearing a union committee leader union button on a daily basis, participating in the March 17 union march and picketing at the Tropicana Hotel, the March 31, 2016 union march and picketing photographed and videoed by Respondent at the Treasure Island Hotel, and filing a charge against Respondent in Case No. 28-CA-173178 which was later delivered to Respondent and Martin in the form of a draft settlement agreement before Chuc was terminated on June 10, 2016. Chuc also filed an amended charge in Case No. 28-CA-177062 before he was terminated. For reasons previously stated, I further find that Martin was aware of all of these protected union activities and concerted activities.

At issue is whether the General Counsel demonstrated that the Respondent harbored antiunion animus, thus meeting his initial burden.

B. Respondent's Animus

The third element, animus, is explained below and is readily established by the close timing of Respondent's discipline of Chuc in relation to his protected activities, the disparate and abnormally-severe discipline of Chuc as compared to other employees, Respondent's failure to conduct a reasonable investigation, and its shifting explanations and false statements for this discriminatory written warning, suspension and discharge.

Evidence that may establish a discriminatory motive—i.e., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee—includes, among other things: (1) close timing between discovery of the employee's protected activities and the discipline (see, e.g., *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (2) the departure from established discipline procedures; (3) inappropriate or excessive penalty; (4) an incomplete or inadequate investigation into the alleged employee adverse conduct; and (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a nondiscriminatory explanation that defies logic or is clearly baseless (see, e.g., *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *CNN America, Inc*. 361 NLRB No. 47 (2014); *Lucky Cab Co.*, 360 NLRB 271 (2014); *Manor Care Health Services—Easton,* 356 NLRB 202, 204

(2010); *Greco & Haines, Inc.,* 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088 fn.12, *citing Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997); and *K&M Electronics*, 283 NLRB 279, 291 (1987)).

Here, the timing of Chuc's written May 23 warning, the May 23 suspension, and the June 10 discharge, less than 2 months after Chuc's union picketing at the Treasure Island Hotel, about a month and a half after Chuc filed the April 4 charge with the Board in Case No. 28-CA-1173178 against Respondent, and immediately after Chuc filed his amended charge in Case No. 28-CA-177062 against Respondent, together support an inference that these union activities motivated the Respondent to issue a written warning, suspension, and discharge for the same, single offense.

Respondent's discipline of Chuc was excessive. He was first given a written warning for the May 22 Chuc incident. Later on May 23, Respondent issued Chuc a suspension for the exact same May 22 Chuc incident. A few weeks later, Respondent discharged Chuc for the exact same May 22 Chuc incident. Amusingly, the suspension and discharge make reference to a "prior discipline" which, Bran explained, was the May 23 written warning. This is blatant pretext for adverse action, as there was no prior discipline issued to Chuc save the triple discipline relating to the same May 22 Chuc incident. Chuch's discipline record was spotless before May 23. Martin described Chuc as "a great employee." I find that this inappropriate or excessive penalty issued to Chuc for the same May 22 incident is evidence of animus.

Respondent conducted an incomplete or inadequate investigation into Chuc's alleged adverse conduct by failing to interview him at any time, and failing to try and duplicate the 10 colored blanket damage by putting blankets though similar double stain wash cycle No. 19 formula washes as Respondent only focused on dryer conditions. (See i.e., footnote 15 above.) In addition, Respondent mentioned other problems caused by its own supervisors which is similar to the orders provided him by Supervisor Quintana here and Respondent failed to interview other employees who were present on May 22 to determine whether its own management was involved in the damaged blankets. (Tr. 63–64, 72.) The employer's failure to give an employee the opportunity to explain the circumstances for which he is being disciplined or discharged supports a finding of employer pretext. *Diamond Electric Mfg. Corp.*, 346 NLRB 857, 861 (2006); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002). Respondent's failure to allow Chuc the opportunity to respond to the allegations of misconduct is indicative of animus.

Respondent's false explanations for disciplining Chuc are additional evidence of animus. Martin said that the reason Chuc was suspended was that he hid the damaged blankets from sight and management. (Tr. 60.) This is not true, as Shift Manager Monzon and Supervisor Quintana were fully aware of all of the damaged blankets from the May 22 Chuc incident. Quintana not only delivered all of the damaged blankets to Bran's office, but also emailed or texted that the damaged blankets were left in Bran's office early the morning of May 23. Also, Martin made up his story that Chuc suffered from behavioral issues as no evidence to support this false claim was presented. Similarly, Bran's explanation that Chuc was suspended because Bran discovered new additional information on May 23 is untrue as Bran admits that everything he learned about the damaged blankets he learned from Supervisor Quintana and there was never any new additional information found by Bran and related to the May 22 Chuc incident. I further find Respondent's

shifting explanations provided for Chuc's adverse action as further evidence of pretext and antiunion animus.

Moreover, the record shows that the suspension and discharge were not consistent with the Respondent's previous application of its disciplinary policy. Under similar circumstances, Juarez received only a written warning for damaging colored blankets owned by the Cosmopolitan Hotel. Respondent's actions demonstrate blatant disparate treatment of Chuc. This departure by Respondent from its prior discipline policy is further evidence of animus.

Having found overwhelming evidence of animus to support the General Counsel's initial burden, I turn to whether the Respondent has established that it would have warned, suspended, or discharged Chuc for damaging blankets even in the absence of the protected conduct. I find that the Respondent failed to make that showing.

Because I have found that the General Counsel has met his burden, the burden shifts to Respondent. The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011); *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010), enfd. 646 F.3d 929 (D.C. Cir. 2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on) as here, the employer fails to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). The trier of fact may not only reject a witness' story, but also determine that the truth is the complete opposite. *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016).

Because of the incredible evidence of animus referenced above, Respondent does not prove that it would have disciplined, suspended, or discharged Chuc regardless of his protected concerted activities. In these circumstances, I find that Respondent warned, suspended, and discharged Chuc because he was affiliated with the Union and because he cooperated with the Board in bringing two unfair labor practice cases, all in violation of Sections 8(a)(4), (3), and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By issuing a written warning, suspending, and discharging employee Hugo Chuc because he joined and assisted the Union and engaged in concerted union activities, including wearing a union committee leader button daily and marching and picketing at the Treasure Island Hotel on March 31, 2016, and/or to discourage employees from engaging in these activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

3. By issuing a written warning, suspending, and discharging employee Hugo Chuc because he joined and assisted the Union and engaged in concerted activities, including filing two charges with the National Labor Relations Board in Case Nos. 28-CA-173178 and 28-CA-177062 against the Respondent, the Respondent violated Section 8(a)(4) and (1) of the Act.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act in any other manner.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must cease and desist from such practices and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having concluded that the Respondent is responsible for the unlawful written warning, suspension, and discharge of employee Hugo Chuc, the Respondent must offer him immediate reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. I also order that Respondent make Hugo Chuc whole, with interest, for any loss of earnings and other benefits that he may have suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Also, Respondent must compensate Hugo Chuc for his search-for-work and interim employment expenses regardless of whether those expenses exceed each of their interim earnings. *King Soopers, Inc*., 364 NLRB No. 93, slip op. at 9 (2016). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, the Respondent shall compensate Hugo Chuc for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for him. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). The Respondent shall also be required to expunge from its files any and all references to the written warning, suspension, and discharge, and to notify Hugo Chuc in writing that this has been done and that none of these unlawful disciplines will be used against him in any way.

The Respondent shall also post the notice in accord with *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. Id. at 13.

On these findings of fact, conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended[20]

ORDER

The Respondent, Apex Linen Service, Inc., a Nevada corporation, with a facility in Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Unlawfully warning, suspending, or discharging or otherwise discriminating against Respondent's employees because they joined and assisted the Union and engaged in concerted activities, including filing a charge with the National Labor Relations Board against the Respondent, and/or to discourage employees from engaging in these activities.

(b) Unlawfully warning, suspending, or discharging or otherwise discriminating against Respondent's employees because they had charges filed with the National Labor Relations Board on their behalf.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer employee Hugo Chuc immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make employee Hugo Chuc whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, as set forth in the remedy section of this decision.

(c) Compensate employee Hugo Chuc for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate report to the Social Security Administration so that when backpay is paid to him, it will be allocated for him to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written warning, suspension, and discharge, and within 3 days thereafter, notify employee Hugo Chuc in writing that this has been done and that the loss of employment will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

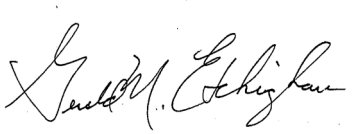
(f) Within 14 days from the date of this order, post at its facilities in and around Las Vegas, Nevada, copies of the attached notice marked "Appendix"[21] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

signed by the Respondent's authorized representative, shall also be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 10, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 1, 2017



Gerald Michael Etchingham
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT discipline, suspend, or fire employees because of their union activities or support.

WE WILL NOT discipline, suspend, or fire employees because they file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL remove from our files all references to the discipline, suspension, and discharge of Hugo Chuc and **WE WILL** notify him in writing that this has been done and that the written warning will not be used against him in any way.

WE WILL offer Hugo Chuc immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay Hugo Chuc for the wages and other benefits he lost because we fired him.

APEX LINEN SERVICE, INC,
A NEVADA CORPORATION

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004–3099
Hours: 8:15 a.m. to 4:45 p.m.
602–640–2160

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/28-CA-177062 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (620)416-4755.